

mother. In our opinion such a situation was not within but outside the act, and the heir's conveyance to the defendant was void.

Apparently the act has been a source of much trouble,¹¹ and recently it has been repealed, but with saving clauses protecting rights lawfully acquired under it.¹²

Decree reversed.

NATHANSON v. UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.

No. 39. Argued October 9, 1933.—Decided November 6, 1933.

1. Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough. P. 46.
 2. This principle applies to searches for goods imported in fraud of the tariff law as well as to other cases. P. 47.
- 63 F. (2d) 937, reversed.

CERTIORARI, 289 U.S. 720, to review the affirmance of a sentence in a prosecution under the National Prohibition Act for unlawful possession of intoxicating liquors. The trial court had refused to exclude evidence for the Government obtained by searching a private dwelling under color of a search warrant.

Mr. Frederic M. P. Pearse for petitioner.

The warrant was void. The affidavit contained no facts on which to base a finding of probable cause. *In*

¹¹Annual Reports Commissioner of Indian Affairs, 1906, title "Kickapoos"; 1911, title "Mexican Kickapoo Indians"; Senate Reports, Vol. A, No. 5, 60 Cong., 1st Sess.; Senate Report No. 710, 72 Cong., 1st Sess.; House Report No. 1901, 72 Cong., 2d Sess.

¹²Act February 17, 1933, c. 97, 47 Stat. 819.

re Rule of Court, Fed. Cas. No. 12,126; *United States v. Lefskowitz*, 285 U.S. 452; *Weeks v. United States*, 232 U.S. 383; *Byars v. United States*, 273 U.S. 28; *Go-Bart Importing Co. v. United States*, 282 U.S. 344; *Cooley*, Const. Lim., 7th ed., p. 427.

Under § 595 of the Tariff Act, as under the Internal Revenue Acts, an affidavit merely tracking the statute and not setting forth facts from which probable cause can be found, is insufficient. 24 Ops. Atty. Gen. 685; *Wagner v. United States*, 8 F. (2d) 581; *Ripper v. United States*, 178 Fed. 24, 26; *Woods v. United States*, 279 Fed. 706; *Schencks v. United States*, 2 F. (2d) 185, 187; *United States v. Rykowski*, 267 Fed. 866, 868, 869; *United States v. Pitotto*, 267 Fed. 603, 604; *United States v. Armstrong*, 275 Fed. 506, 508; *United States v. Swan*, 15 F. (2d) 598, 599.

Among the cases which hold that an affidavit under the Tariff Act must contain more than an affirmation of suspicion is *United States v. Federal Mail Order Corp.*, 47 F. (2d) 164, 165. See also *In re Chin K. Shue*, 199 Fed. 282; *Pappas v. Lufkin*, 17 F. (2d) 988; and *United States v. Clark*, 18 F. (2d) 442.

The evidence before the magistrate issuing the warrant must be competent and must appear in the supporting affidavits. *Grau v. United States*, 287 U.S. 124; *Wagner v. United States*, 8 F. (2d) 581; *Giles v. United States*, 284 Fed. 208; *Poldo v. United States*, 55 F. (2d) 866.

Assistant Solicitor General MacLean, with whom *Solicitor General Biggs* was on the brief, for the United States.

The same Congress that proposed the Fourth Amendment passed the Act of July 31, 1789, which, practically speaking, has been in force ever since and is virtually the Tariff Act of 1922 as it relates to searches and seizures. From the very beginning, therefore, it was recognized

that searches and seizures were necessary to maintain revenue and to prevent violations of the customs and navigation laws; and equally so that to be effective they could not await conviction upon proof beyond a reasonable doubt, or the production of *prima facie* evidence, but that the search was reasonable or permissible if the customs officer acted upon *bona fide* belief and justified suspicion, or information that appeared to be reliable. *Boyd v. United States*, 116 U.S. 616, 623-624. Cf. *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510; *General Motors Corp. v. United States*, 286 U.S. 49, 56, 57; *United States v. Federal Mail Order Corp.*, 47 F. (2d) 164, 165.

It is certain the Fourth Amendment did not contemplate that the cellar of a man's house should afford a safe haven for smuggled goods or constitute a barrier against those authorized and required to find them. It seems, therefore, that good ground may exist for the distinction made in this case by the court below between a case under the revenue acts and a case under the prohibition law. *Bookbinder v. United States*, 287 Fed. 790; cert. den., 262 U.S. 748.

An eyewitness can hardly be expected or required in this class of cases. *Locke v. United States*, 7 Cranch 339, 347.

Searches and seizures under the Prohibition and Espionage Acts, are, as a general statement, intended to procure evidence primarily for the purpose of convicting a defendant, and the warrants may be sworn out by any person producing evidence or making the necessary affidavit. On the other hand, under the Customs and Revenue laws, the primary purpose is to collect revenue, and prevent smuggling, and it is contemplated that the warrant will be applied for by an officer of some standing and experience who ordinarily will act with a reasonable amount of discretion, without being overcome by exces-

sive zeal or personal prejudice. Besides, to apply the same rule in this class of cases "would render the provision totally inoperative," as observed by Chief Justice Marshall in *Locke v. United States*, *supra*, p. 16.

The fact that the search warrant was obtained and seizure made under the Tariff Act, but that Nathanson was convicted under the Prohibition Act, affords no ground for reversal, nor is the question raised in his behalf. *Gouled v. United States*, 255 U.S. 298.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

In the trial court, where he was defendant under a criminal information, petitioner Nathanson duly, but unsuccessfully, challenged the admission as evidence of certain liquors seized under color of a search warrant, issued, he claimed, in violation of the Fourth Amendment. The Circuit Court of Appeals affirmed the judgment against him.

Upon complaint of the customs agent in charge, a State judge sent out the questioned warrant. Its pertinent recitals and command follow:

"Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave. . . .; and

"Whereas said Francis B. Laughlin has requested that a warrant issue to him, authorizing him to enter said premises and search for and seize said merchandise:

"Now, therefore, you are commanded, in the name and by the authority of the President of the United States, to enter and search the premises hereinbefore described, in the daytime (if a dwelling house) at any time of the day or night (if other than a dwelling house) and to seize and take into your possession the merchandise hereinbefore described, or so much thereof as may be found, to the end that the same may be dealt with according to law."

The Circuit Court of Appeals said [63 F. (2d) 937, 938]—"The appellant contends that the affidavit upon which the search warrant was issued showed no facts upon which to base a finding of probable cause; that the search warrant was therefore illegal; and that the use of the property so seized as evidence in a criminal prosecution amounted to a violation of the protection afforded by the Fourth Amendment to the Constitution. . . .

"Had this warrant issued under authority of the Prohibition Act, it would be invalid, since the affidavit was merely based upon cause to suspect and suspicion. It issued, however, under the authority of [§ 595] the Tariff Act of 1930 . . ." [46 Stat. 752, c. 497; 19 U.S.C.A. Supp. 1595. This is identical with § 595, Tariff Act of 1922, 42 Stat. 983, c. 356, copied in the margin*.]

And it held [p. 939]—"In the instant case the seizure was under the tariff laws. The Government had a pecu-

*Act 1922 and Act of 1930. Sec. 595. Searches and seizures. (a) Warrant. If any collector of customs or other officer or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any merchandise upon which the duties have not been paid, or which has been otherwise brought into the United States contrary to law, he may make application, under oath, to any justice of the peace, to any municipal, county, State, or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise. . . .

niary interest in the smuggled goods. Following the reasoning in the cases cited, we conclude that that interest was sufficient to justify the issuance of the search warrant and that the search and seizure, based on the sworn complaint (phrased almost in the very words of the Tariff Act) and the warrant thereon, did not violate the constitutional rights of the defendant. This court, in *Bookbinder v. United States*, 287 Fed. 790, certiorari denied, 262 U.S. 748, held that evidence obtained on a search warrant for violation of the customs laws is admissible in a prosecution for violation of the prohibition laws."

We think the court below acted upon an erroneous view. Its judgment must be reversed.

This court has often spoken concerning searches and seizures and the limitations of the Fourth Amendment. *Locke v. United States*, 7 Cranch 339; *Boyd v. United States*, 116 U.S. 616; *Adams v. New York*, 192 U.S. 585; *Weeks v. United States*, 232 U.S. 383; *Gould v. United States*, 255 U.S. 298; *Byars v. United States*, 273 U.S. 28; *Maul v. United States*, 274 U.S. 501; *Go-Bart Importing Co. v. United States*, 282 U.S. 344; *United States v. Lefkowitz*, 285 U.S. 452. See also Cooley, *Constitutional Limitations*, 7th ed., p. 427.

Here, we are dealing with a warrant to search a private dwelling said to have been authorized by the Tariff Act. It went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts.

All unreasonable searches and seizures are absolutely forbidden by the Fourth Amendment. In some circumstances a public officer may make a lawful seizure without a warrant; in others he may act only under permission of one. In the present case the place of search and seizure was a private dwelling. The challenged warrant is said to constitute adequate authority therefor. The legality of the seizure depends upon its sufficiency. Did it issue upon probable cause supported by oath or affirmation within the intendment of the Amendment?

The Amendment applies to warrants under any statute; revenue, tariff, and all others. No warrant inhibited by it can be made effective by an act of Congress or otherwise.

It is argued that searches for goods smuggled into the United States in fraud of the revenue, based upon affidavits of suspicion or belief, have been sustained from the earliest times; that this practice was authorized by the Revenue Act of July 31, 1789, 1 Stat. 43, also subsequent like enactments. But we think nothing in these statutes indicates that a warrant to search a private dwelling may rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances.

Although relied upon, we find nothing in *Locke v. United States* and *Boyd v. United States* which upholds the view of the Circuit Court of Appeals. The first of these causes was a proceeding to forfeit a cargo of imported goods seized for violation of the revenue laws. It presented no question concerning the validity of a warrant. The second denied the right to compel production of private papers in a suit by the United States to establish a forfeiture of goods fraudulently imported.

Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.

Reversed.

TRAINOR CO. v. AETNA CASUALTY & SURETY CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.

No. 13. Argued October 12, 1933.—Decided November 6, 1933.

1. Upon default after partial performance of a building contract, the measure of damages recoverable by a mortgagee-obligee on a bond guaranteeing completion, is the difference between the value, at the